



**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
DR. PREM MOHAN,)	
)	
Complainant,)	
)	Charge No.: 1994CF0581
and)	EEOC No.: 21B933410
)	ALS No.: 9842
THE UNIVERSITY OF ILLINOIS)	
AT CHICAGO,)	
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

On March 13, 1997, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Dr. Prem Mohan. That complaint alleged that Respondent, The University of Illinois at Chicago, discriminated against Complainant on the basis of his race and national origin when it denied him a promotion and tenure.

A public hearing on the allegations of the complaint was held before Administrative Law Judge Norma Barnes-Euresti. That hearing began on October 19, 1998 and continued on October 22, 23, 26, 27, and 30, November 9 and 10, and December 3, 1998. Subsequently, the parties filed post-hearing and reply briefs.

Unfortunately, Judge Barnes-Euresti left her employment with the Human Rights Commission before she could render a decision in the case. The parties then convened to retry the matter on March

17, 2000. At the second hearing, after presenting some oral arguments in support of their respective positions, the parties agreed to submit the transcript of the previous hearing and to have that transcript treated as a series of evidence depositions. The parties also agreed to stand on their earlier post-hearing briefs. The matter is ready for decision.

FINDINGS OF FACT

Those facts marked with asterisks are facts to which the parties stipulated. The remaining facts are those which were determined to have been proven by a preponderance of the evidence at the public hearing on this matter. Assertions made at the public hearing which are not addressed herein were determined to be unproven or were determined to be immaterial to this decision.

1. Complainant, Dr. Prem Mohan, was employed by Respondent, The University of Illinois at Chicago, from July 1, 1987 through August 31, 1994. Throughout that time, Complainant was an Assistant Professor in Respondent's Department of Medicinal Chemistry and Pharmacognosy. That department is part of Respondent's College of Pharmacy.*

2. Complainant's race is Asian, and he is of Sri Lankan national origin.*

3. Respondent's internal governing document regarding faculty rights is called the University of Illinois Statutes. Under the Statutes, a newly-hired assistant professor enters a probationary period of seven years of academic service. An

assistant professor may be considered for promotion and/or tenure at any time prior to the sixth year of that probationary period. A tenure review for assistant professors must be done in the sixth year of academic service unless tenure was previously achieved.*

4. An assistant professor who is is not given a promotion and tenure in the sixth year of the probationary period typically is given a terminal contract. Under those circumstances, employment with Respondent terminates the following year.*

5. A tenured associate or full professor has an indefinite appointment with Respondent subject to dismissal for cause and subject to the other terms and conditions of the appointment.*

6. Under Respondent's rules, there are several steps in the tenure review process. The first step in that process is that the department head submits a list of tenure candidates to the dean of the appropriate college, along with a description of the procedures and criteria followed by the department in developing its recommendations for promotion and tenure. The department then sends its recommendations to the dean of the college. Those include the recommendations of both the department head and the departmental advisory committee.*

7. Department recommendations are reviewed at the college level by the college faculty committee and by the dean. The college then forwards its recommendations and those of the department to the Graduate College Faculty Advisory Committee and

the Dean of the Graduate College.*

8. At the campus level, applications and prior recommendations are reviewed by the Vice-Chancellor for Academic Affairs and then by the Chancellor. If the Chancellor approves the candidate, that candidate's application is forwarded to the Board of Trustees for final approval. Although there is no obligation to do so, the Board of Trustees routinely approves favorable recommendations.*

9. Candidates who are not recommended by the Chancellor are not referred to the Board of Trustees. As a result, except for internal appeal and grievance rights, the Chancellor's review is the final step in the tenure review process for those who are denied tenure.*

10. The faculty of the Department of Medicinal Chemistry and Pharmacognosy voted to recommend promotion and tenure for Complainant (5 in favor; 0 against; 0 abstentions; 0 absent).*

11. Dr. Geoffrey Cordell, head of Complainant's department, recommended that Complainant be promoted.*

12. The College of Pharmacy voted to recommend promotion and tenure for Complainant (8 in favor; 0 against; 0 abstentions; 2 absent).*

13. Dr. John Pezzuto, interim Dean of the College of Pharmacy, recommended promotion and tenure for Complainant.*

14. The Faculty Advisory Committee of the Campus Graduate College voted against giving Complainant promotion and tenure (0

in favor; 10 against; 1 abstention; 3 absent).*

15. The Dean of the Graduate College recommended against giving Complainant promotion and tenure.*

16. Dr. David C. Broski, Vice-Chancellor for Academic Affairs, recommended in favor of promotion and tenure for Complainant.*

17. Dr. James J. Stukel, the Chancellor of the Chicago campus, did not recommend Complainant for promotion and tenure. Stukel informed Complainant of his decision in a letter dated May 18, 1993. Stukel is white and is not of Complainant's national origin.*

18. As a result of Stukel's decision, Complainant was denied promotion and tenure. He was given a terminal contract for the 1993-94 academic year.*

19. Dr. Christopher Beecher was an assistant professor in the Department of Medicinal Chemistry and Pharmacognosy who was reviewed for promotion and tenure during the 1992-93 academic year.*

20. Beecher was not recommended for promotion and tenure by the faculty in his department (1 in favor; 4 against; 0 abstentions, 0 absent).*

21. Dr. Cordell, the department head, recommended Beecher for promotion and tenure.*

22. The College of Pharmacy recommended Beecher for promotion and tenure (7 in favor; 2 against; 0 abstentions; 1

absent), as did Dr. Pezzuto, the interim Dean of the college.*

23. The Executive Committee of the Graduate College did not recommend Beecher for promotion and tenure (0 in favor; 9 against; 0 abstentions; 5 absent).*

24. Dr. Allen Lerner, Dean of the Graduate College, did not recommend Beecher for promotion and tenure.*

25. Dr. Broski recommended Beecher for promotion and tenure.*

26. Dr. Stukel recommended Beecher for promotion and tenure, and the university's Board of Trustees approved that recommendation effective September 1, 1993.*

27. Beecher is neither Asian nor of Sri Lankan national origin.

28. According to the rules set forth in Respondent's faculty handbook, tenure decisions should be based upon the candidates' performance in the three prime missions of the university: teaching, research, and public service. The most important criterion is research, but a weakness in one area can be offset by particular strength in another area.

29. Each tenure candidate provides documentation to demonstrate his accomplishments and "promise" in the three major evaluation criteria. That documentation is part of the candidate's tenure file. A tenure file also includes letters from external reviewers (at least three, but generally no more than six) solicited by the department head, the department head's

appraisals of the candidate's teaching ability and service contributions, and the results of the decisions made during each step of the tenure process.

30. According to Dr. Stukel, there are three general types of tenure files. Those types are 1) files in which there is no question that tenure should be granted, 2) those in which there is no question that tenure should be denied, and 3) those that are "close cases," in that there are differing opinions as to whether tenure should be granted. Complainant's file was one of the close cases. Beecher's file also was a close case.

31. Complainant was hired to be a "bench scientist." As a result, he maintained teaching and service responsibilities, but his primary responsibility was the development of an independent, sustainable research program within his field.

32. The department head rated Complainant's teaching as "excellent," although he never won any teaching awards. Complainant's service contribution was rated as "satisfactory."

33. The department head rated Beecher's teaching as "good" and rated his service contribution as "excellent."

34. Despite numerous grant applications, Complainant never received a grant from the National Institute of Health (NIH). NIH rates all applications as either approved or disapproved. The approved applications are then listed in order of importance and those highest on the list are funded.

35. Most of Complainant's grant applications to NIH were

approved but not funded. Two of those applications, though, were disapproved.

36. Of the seven external referees who reviewed Complainant's qualifications, two recommended against promotion and tenure. Both of those reviewers criticized the narrow focus of Complainant's choice research. Dr. Arthur Broom of the University of Utah, a member of an NIH research group, suggested that Complainant's area of study would not get NIH support. He also stated that Complainant's record did not show "clear evidence" of "steady progression toward achievable realistic goals."

37. Dr. David Chu of the University of Georgia supported Complainant's promotion, but noted that "some of his papers seem to overlap each other."

38. Dr. John Secrist of the Southern Research Institute recommended promotion for Complainant, but stated that Complainant published "more papers than necessary" to present his research data.

39. Complainant's research focus was the application of certain non-nucleoside compounds as potential anti-HIV agents. At the time of Complainant's tenure review, the use of nucleoside compounds in AIDS research was more popular among medicinal chemists than use of non-nucleoside compounds.

40. There is nothing in the record to indicate that any of Respondent's faculty members were awarded tenure after receiving

two negative recommendations from external referees.

41. Dr. Stukel's doctorate is in engineering.

42. In a letter dated May 18, 1993, Dr. Stukel informed Complainant that he could not recommend Complainant's promotion. In that letter, Dr. Stukel stated that the Executive Committee of the Graduate College had raised "a number of issues with regard to your independence as a researcher and the quality of the research papers." The letter also stated that the Executive Committee had "noted that the documentation of your teaching record is not strong." According the letter, the "concerns raised by the Executive Committee" led Dr. Stukel to conclude that he could not support Complainant's promotion.

43. The Executive Committee of the Graduate College did not raise the issues described by Dr. Stukel in his May 18 letter.

44. Beecher was in charge of the data processing aspects of the NAPRALERT and MEDFLOR databases. Although NAPRALERT existed prior to Beecher's involvement, the database was not on-line and was not being marketed by the university. MEDFLOR, which was used in fourteen countries in Central and South America, was developed by Beecher under the sponsorship of the Organization of American States. In addition to providing an income stream for the university, those programs increased Respondent's international profile and prestige.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by

section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-1-1 *et seq.* (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101 (B) (1) (c) of the Act and is subject to the provisions of the Act.

3. Complainant established a *prima facie* case of discrimination against him on the basis of his race.

4. Complainant established a *prima facie* case of discrimination against him on the basis of his national origin.

5. Respondent articulated legitimate, non-discriminatory reasons for its actions.

6. Complainant failed to prove by a preponderance of the evidence that Respondent's articulated reason is a pretext for unlawful discrimination.

7. Respondent's Motion to Correct Record is denied.

8. Respondent's Motion to Supplement the Record is denied.

9. Complainant's Motion to Strike is granted in part and denied in part.

10. Respondent's oral motion to exclude testimony regarding Dr. Hsi-Yuan Yang and Dr. Shome Sinha is denied.

DISCUSSION

Complainant, Dr. Prem Mohan, was employed by Respondent, The University of Illinois at Chicago, from July 1, 1987 through August 31, 1994. Throughout that time, Complainant was an Assistant Professor in Respondent's Department of Medicinal Chemistry and Pharmacognosy. That department is part of

Respondent's College of Pharmacy.

During the 1992-1993 academic year, Complainant was considered for promotion to Associate Professor. Such a promotion carries an award of tenure. After the review process was completed, Complainant was informed that he had been denied promotion and tenure. Instead, he was given a terminal contract for the 1993-94 academic year.

Subsequently, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent denied Complainant a promotion because of his race and national origin. Complainant's race is Asian, and he is of Sri Lankan national origin.

Before proceeding to the analysis of Complainant's claim, it is necessary to address some motions which were filed by the parties after the conclusion of the public hearing. Respondent filed a motion to correct the record and a motion to supplement the record while Complainant filed a motion to strike documents submitted as appendices to Respondent's posthearing brief.

Respondent's Motion to Correct the Record clearly cannot be granted. Respondent argues that the court reporter erroneously transcribed a few small parts of the voluminous transcript. Complainant disputes Respondent's assertions. At the public hearing in this matter the parties submitted the transcripts of an earlier hearing and asked that those transcripts be treated as a series of evidence depositions. The administrative law judge

who presided at the earlier hearing is no longer employed by the Human Rights Commission and therefore is unavailable to resolve the dispute over the words used at that hearing. In short, the parties disagree as to whether the requested changes are correct and the judge writing this decision has no independent recollection of his own upon which to rely. In this situation, the only logical solution is to rely upon the skills of the court reporter. Accordingly, Respondent's Motion to Correct the Record is denied.

Respondent's Motion to Supplement the Record also must be denied. Respondent seeks to add an affidavit which was used in support of a motion for summary decision, but was not admitted at the public hearing. The public hearing was the time for submitting evidence. Had Respondent moved to admit the affidavit at that point, arguments would have been heard and a ruling would have been made. It is improper to wait until after the proofs have closed to offer a piece of evidence. The affidavit in question was prepared long before the public hearing and it certainly was available before the proofs were closed. Thus, Respondent's Motion to Supplement the Record is denied.

Complainant's Motion to Strike is granted in part and denied in part. Dr. Stukel's affidavit is stricken for the reasons discussed above. The remaining appendices to Respondent's brief, though, appear to be nothing more than fact recitations supported by citations to the record. As such, they are nothing more than

recommended findings of fact. The motion to strike is denied as to those recommended findings.

Finally, there was a motion to exclude testimony which Respondent made orally on the record during the first public hearing on this matter. The presiding administrative law judge took that motion under advisement pending receipt of the transcript and briefing by the parties. After review of the transcript and arguments, that motion is denied. The evidence in question involved the promotion decisions made in regard to Dr. Hsi-Yuan Yang and Dr. Shome Sinha. There is some doubt about the probative value of that evidence, but the motion to exclude it is denied.

The method of proving a charge of discrimination through indirect means is well-established. First, Complainant must establish a *prima facie* showing of discrimination. If he does so, Respondent must articulate a legitimate, non-discriminatory reason for its actions. For Complainant to prevail, he must then prove that Respondent's articulated reason is pretextual. ***Zaderaka v. Human Rights Commission***, 131 Ill. 2d 172, 545 N.E.2d 684. See also ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 251 (1981).

To analyze Complainant's claim, it is necessary to know some basic information about how Respondent's promotion system works. Respondent's internal governing document regarding faculty rights is called the University of Illinois Statutes. Under the

Statutes, a newly-hired assistant professor enters a probationary period of seven years of academic service. An assistant professor may be considered for promotion and/or tenure at any time prior to the sixth year of that probationary period. A tenure review for assistant professors must be done in the sixth year of academic service unless tenure was previously achieved.

A tenured associate or full professor has an indefinite appointment with Respondent subject to dismissal for cause and subject to the other terms and conditions of the appointment. An assistant professor who is is not given a promotion and tenure in the sixth year of the probationary period typically is given a terminal contract. Under those circumstances, employment with Respondent terminates the following year.

Under Respondent's rules, there are several steps in the tenure review process. The first step in that process is that the department head submits a list of tenure candidates to the dean of the appropriate college, along with a description of the procedures and criteria followed by the department in developing its recommendations for promotion and tenure. The department then sends its recommendations to the dean of the college. Those include the recommendations of both the department head and the departmental advisory committee.

Department recommendations are reviewed at the college level by the college faculty committee and by the dean. The college then forwards its recommendations and those of the department to

the Graduate College Faculty Advisory Committee and the Dean of the Graduate College. At the campus level, applications and prior recommendations are reviewed by the Vice-Chancellor for Academic Affairs and then by the Chancellor. If the Chancellor approves the candidate, that candidate's application is forwarded to the Board of Trustees for final approval. Although there is no obligation to do so, the Board of Trustees routinely approves favorable recommendations. Candidates who are not recommended by the Chancellor are not referred to the Board of Trustees. As a result, except for internal appeal and grievance rights, the Chancellor's review is the final step in the tenure review process for those who are denied tenure.

Complainant's tenure application went through the above steps and, in the early stages, things seemed to go well for him. The faculty of the Department of Medicinal Chemistry and Pharmacognosy voted to recommend promotion and tenure for Complainant (5 in favor; 0 against; 0 abstentions; 0 absent). Dr. Geoffrey Cordell, head of Complainant's department, recommended promotion. The College of Pharmacy voted to recommend promotion and tenure for Complainant (8 in favor; 0 against; 0 abstentions; 2 absent), and Dr. John Pezzuto, interim Dean of the College of Pharmacy, also recommended promotion and tenure.

At that point, things became less positive for Complainant. The Faculty Advisory Committee of the Campus Graduate College

voted against giving him promotion and tenure (0 in favor; 10 against; 1 abstention; 3 absent). Following that lead, the Dean of the Graduate College recommended against Complainant.

Dr. David C. Broski, Vice-Chancellor for Academic Affairs, recommended in favor of promotion and tenure for Complainant. However, despite that recommendation, Dr. James J. Stukel, the Chancellor of the Chicago campus, did not recommend Complainant for promotion and tenure. Stukel informed Complainant of his decision in a letter dated May 18, 1993. As a result of Stukel's decision, Complainant was denied promotion and tenure, and he was given a terminal contract for the 1993-94 academic year.

The above facts establish much of Complainant's *prima facie* case. To establish a *prima facie* case of discrimination in a tenure situation, Complainant had to establish four elements. He had to prove 1) that he was in a protected class; 2) that he was qualified for promotion and tenure; 3) that he was denied promotion and tenure; and 4) that similarly situated applicants outside his protected class were granted promotion and tenure.

Namenwirth v. Bd. of Regents of Univ. of Wisconsin System, 769 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986).

There is no dispute that Complainant was in protected classes with regard to both his race and national origin. There also is no dispute that he was denied tenure and promotion. Those agreed matters establish the first and third elements. The remaining two elements, though, are hotly disputed.

For openers, Respondent asserts that Complainant was not qualified for promotion. However, the only justification for that conclusion seems to be the fact that Dr. Stukel did not recommend promotion. Respondent's position is untenable.

Under Respondent's own rules, there are several individuals and groups whose job duties include evaluation of applicants for promotion and tenure. Several of those charged with such responsibilities, including Respondent's Vice-Chancellor for Academic Affairs, recommended that Complainant be promoted. Clearly, for purposes of a *prima facie* case, Complainant proved that he was qualified for promotion.

In addition, Complainant established that a similarly situated applicant outside his protected class was awarded promotion and tenure. That similarly situated applicant was Dr. Christopher Beecher. Respondent argues that Dr. Beecher is not comparable to Complainant, but that argument must be rejected.

The circumstances surrounding the promotion efforts of Complainant and Dr. Beecher were quite close. Like Complainant, Dr. Beecher was an assistant professor in the Department of Medicinal Chemistry and Pharmacognosy who was reviewed for promotion and tenure during the 1992-93 academic year. (Dr. Beecher's specialty was in pharmacognosy, not medicinal chemistry, but that distinction is meaningless in this situation.) Like Complainant, Dr. Beecher was recommended at some of the levels of review and not recommended at others.

Finally, unlike Complainant, Dr. Beecher ultimately was promoted and granted tenure.

Beecher was not recommended for promotion and tenure by the faculty in his department (1 in favor; 4 against; 0 abstentions, 0 absent). Despite that vote, Dr. Cordell, the department head, recommended Beecher for promotion and tenure. The College of Pharmacy recommended Beecher (7 in favor; 2 against; 0 abstentions; 1 absent), as did Dr. Pezzuto, the interim Dean of the college. The Executive Committee of the Graduate College recommended against Dr. Beecher (0 in favor; 9 against; 0 abstentions; 5 absent). Despite that vote, Dr. Broski, the vice-chancellor, recommended Beecher for promotion and tenure. Dr. Stukel then recommended Beecher for promotion and tenure, and the university's Board of Trustees approved that recommendation effective September 1, 1993.

Beecher is neither Asian nor of Sri Lankan national origin. Thus, he is outside Complainant's protected classes. He was up for promotion in the same year and from the same department as Complainant. In both cases, the final decision on tenure came from Dr. Stukel, and Dr. Stukel characterized both decisions as "close cases." Clearly, Dr. Beecher was similarly situated to Complainant. Since Dr. Beecher was promoted while Complainant was not, Dr. Beecher's experience satisfies the fourth and final element of Complainant's *prima facie* case.

Even if Complainant had not established a *prima facie* case,

that would not end this discussion. During the public hearing, Respondent articulated a legitimate, non-discriminatory reason for its actions. Once such a reason was articulated, there was no longer any need for a *prima facie* case. Instead, at that point, the emphasis of the case changed, and the decisive issue became whether the articulated reason is pretextual. See **Clyde and Caterpillar, Inc.**, 52 Ill. HRC Rep. 8 (1989), *aff'd sub nom Clyde v. Human Rights Commission*, 206 Ill. App. 3d 283, 564 N.E.2d 265 (4th Dist. 1990).

Respondent's articulated reason was that, in Dr. Stukel's opinion, Complainant's record simply was not strong enough to justify promotion and tenure. To prevail in this action, Complainant had to prove by a preponderance of the evidence that Respondent's articulated reason is a pretext for unlawful discrimination. He failed to meet that burden.

On the surface, Complainant has a very good argument in favor of rejecting Respondent's explanation. The "smoking gun" in that argument is a letter sent to Complainant by Dr. Stukel. In a letter dated May 18, 1993, Dr. Stukel informed Complainant that he could not recommend his promotion. In that letter, Dr. Stukel stated that the Executive Committee of the Graduate College had raised "a number of issues with regard to your independence as a researcher and the quality of the research papers." The letter also stated that the Executive Committee had "noted that the documentation of your teaching record is not

strong." According the letter, the "concerns raised by the Executive Committee" led Dr. Stukel to conclude that he could not support Complainant's promotion.

Unfortunately for Respondent, it is clear from various exhibits that the Executive Committee of the Graduate College did not raise the issues described by Dr. Stukel in his May 18 letter. Dr. Stukel himself conceded at the public hearing that the letter was inaccurate.

Complainant argues that, because the letter is demonstrably inaccurate, the content is necessary false and Respondent's articulated reason must be rejected. Although that argument has some surface appeal, it ultimately should be rejected. Even though the criticisms of Complainant's record did not come from the cited source, the criticisms were in fact made, and they came from more than one source. Furthermore, based upon the record before him, it was not unreasonable for Dr. Stukel to conclude that the stated criticisms were valid.

According to the rules set forth in Respondent's faculty handbook, tenure decisions should be based upon the candidates' performance in the three prime missions of the university: teaching, research, and public service. The most important criterion is research, but a weakness in one area can be offset by particular strength in another area. Each tenure candidate provides documentation to demonstrate his accomplishments and "promise" in the three major evaluation criteria. That

documentation is part of the candidate's tenure file. A tenure file also includes letters from external reviewers (at least three, but generally no more than six) solicited by the department head, the department head's appraisals of the candidate's teaching ability and service contributions, and the results of the decisions made during each step of the tenure process. Complainant's tenure file contains several documents which raise the types of issues described in Dr. Stukel's May 18 letter.

With regard to research issues, there were several potential problems in Complainant's tenure file. For example, despite numerous grant applications, Complainant never received a grant from the National Institute of Health (NIH). That was a potential problem because NIH is a major source of funding (and arguably the most prestigious source of funding) in Complainant's area of expertise.

After receiving each year's funding applications, NIH rates those applications as either approved or disapproved. The rating is done by study sections made up of acknowledged experts in the fields in which the funding is sought. Approved applications are listed in order of importance and those highest on the list are funded. Projects are funded until the annual funding sources are exhausted. Those remaining on the approved list are not funded.

Most of Complainant's grant applications to NIH were approved but not funded. That is the fate of most NIH grant

applications. Two of Complainant's applications, though, were disapproved. Disapproval is potentially a red flag, since a disapproved project is one which is deemed to be of insufficient scientific merit to justify funding.

Complainant also had some major problems with the external referees who were asked to review his research publications. Of the seven external referees who reviewed Complainant's qualifications, two recommended against promotion and tenure. Both of those reviewers criticized the narrow focus of Complainant's choice of research topics.

Some of the external referees made very damaging statements about Complainant's body of work. For example, Dr. Arthur Broom of the University of Utah, a member of an NIH research group, suggested that Complainant's area of study would not get NIH support. He also stated that Complainant's record did not show "clear evidence" of "steady progression toward achievable realistic goals." Dr. Broom's evaluation was devastating to Complainant's hopes. As a member of an NIH group directly related to Complainant's area of study, his low opinion of Complainant's research strongly suggested that Complainant would be no more successful in receiving NIH funding than he had been in the past. In short, Dr. Broom's letter indicated that Complainant was unlikely ever to receive funding from the most important and prestigious funding source in his field. Dr. Stukel testified that an "independent" research program is one

which can find and retain funding sources. By that definition, the permanent absence of NIH funding would be a major blow to Complainant's "independence."

Even some of Complainant's external supporters made statements which damaged his chances of promotion. One such statement came from Dr. David Chu of the University of Georgia. Dr. Chu recommended Complainant's promotion, but noted that "some of his papers seem to overlap each other." Similarly, Dr. John Secrist of the Southern Research Institute recommended promotion for Complainant, but stated that Complainant published "more papers than necessary" to present his research data. Thus, there were concerns raised about Complainant's research and the papers he published to present that research.

Similarly, although the source of the statement is incorrectly named in Dr. Stukel's letter, it is true that the documentation of Complainant's teaching record is not strong. While the department head rated Complainant's teaching as "excellent," there were only course evaluations from a few courses to back up that rating. Most of Complainant's course evaluations were not made part of the tenure file. Complainant had never won any teaching awards, which would have been more concrete evidence of teaching excellence.

In other words, although not raised by the Executive Committee of the Graduate College, there were significant concerns aired about the independence of Complainant's research,

the quality of his research papers, and the documentation in support of his teaching record. It would be unrealistic to disregard those concerns or the effect they had on Dr. Stukel's decision. It also would be unrealistic to characterize those concerns as evidence of pretext.

Complainant also presented comparative evidence to try to meet his pretext burden. The bulk of that evidence concerned the treatment given to Dr. Beecher.

Complainant noted that Dr. Beecher was less accomplished than he was as a teacher. The department head only rated Dr. Beecher's teaching as "good," and there was evidence that his classroom presence was less than commanding. Complainant also had an arguable edge in the production of published research, but as discussed above, there was some question about the utility of his research and the number of publications used to present his findings.

Finally, there was the issue of service. Complainant's service record was average, but Dr. Beecher's service contribution was rated as "excellent" by the department head. Dr. Beecher was in charge of the data processing aspects of the NAPRALERT and MEDFLOR databases. Although NAPRALERT existed prior to Beecher's involvement, the database was not on-line and was not being marketed by the university. MEDFLOR, which was used in fourteen countries in Central and South America, was developed by Dr. Beecher under the sponsorship of the

Organization of American States. In addition to providing an income stream for the university, those programs increased Respondent's international profile and prestige.

It is clear from the record that Dr. Beecher's involvement in the NAPRALERT and MEDFLOR databases was the deciding factor in his promotion. He was the only person in the department who could have performed that work. Without that work, his record probably would have been insufficient to justify an award of tenure. However, with that work, his record did justify tenure.

More importantly, with that work, Dr. Beecher's record was good enough to avoid raising an inference of discrimination against Complainant. Because of his work with NAPRALERT and MEDFLOR, Dr. Beecher had something unique in his tenure file, something Complainant simply did not match.

Complainant's record was solid, but essentially mediocre. The tenure file contained nothing truly special, and the failure to provide a unique achievement doomed his application for tenure.

There is a serious flaw in Complainant's arguments regarding those who were awarded tenure. His chosen comparatives appear to have been selected because they were inferior to Complainant in at least one of the key criteria. That is not same as choosing people whose overall records were inferior to Complainant's.

The people to whom he compared himself may not have been better faculty members, but they had something special which set

them apart and made them much harder to replace. For instance, Complainant claimed that he was comparable to Dr. Donna Kraus, a clinician in the Department of Pharmacy Practice. Dr. Kraus was not a prodigious researcher, but she had written the standard desk reference in her specialty area. Clinicians throughout the country used her book, and that fact added prestige to Respondent's reputation.

The other claimed comparatives all had some special achievement which arguably set their files above Complainant's. Dr. Raymond Schlemmer had won two teaching awards, a sign of unquestioned excellence in the classroom. Dr. Stukel believed Dr. Ronald Koch had such a heavy teaching load that his department would not have been able to offer all its usual courses had he left. In his briefs, Complainant ridicules the concept of "institutional need" because that terminology is not specifically listed as a criterion for promotion. Still, as used to explain Koch's retention, it is clear that the "institutional need" he satisfied is tightly bound to teaching. It is difficult to argue that a teaching institution should be forced to restrict its offered course list over a matter of semantics.

In the limited sample discussed in the public hearing, the only unique factor in Complainant's file was the fact that two external referees had recommended against his promotion. There is nothing in the record to indicate that any of Respondent's faculty members were awarded tenure after receiving two negative

recommendations from external referees.

Dr. Stukel's doctorate is in engineering. He has no special insight into the field of medicinal chemistry. Therefore, it would be logical that he would rely heavily on experts in that discipline to help him make his decision. It is not evidence of pretext that he did in fact rely upon some of the advice from those experts.

It should be noted that Complainant argues that the selection of external referees was itself biased against him. That argument, though, is unconvincing.

Complainant's research focus was the application of certain non-nucleoside compounds as potential anti-HIV agents. At the time of Complainant's tenure review, the use of nucleoside compounds in AIDS research was more popular among medicinal chemists than use of non-nucleoside compounds. Several of the chosen external referees, including the damaging Dr. Broom, were proponents of nucleoside research. Complainant opposed selection of nucleoside chemists and claims that their selection is evidence of discrimination against him. Complainant's argument has two glaring flaws.

First, although the thrust of his case is that Dr. Stukel bore him a discriminatory animus, Dr. Stukel was not the person who chose the external referees. External referees are chosen by the department head. In Complainant's case, the selections were made by Dr. Cordell. It seems unlikely that Dr. Cordell

deliberately discriminated against Complainant in the selection of referees, since he recommended Complainant's promotion. Moreover, the nucleoside/non-nucleoside debate was a valid disagreement within the discipline of medicinal chemistry. Refusing to consider referees from one side or the other of that debate essentially would have had the effect of taking sides in that debate.

Second, there is nothing in the record to link the nucleoside/non-nucleoside debate to race or national origin. There is no doubt that the ability to attract consistent funding is critical to a successful research program. Because nucleoside research was considered more promising at the time, it is hardly surprising that non-nucleoside research would have a particularly difficult time obtaining funding. That apparently was part of what Dr. Broom meant when he said that Complainant's research was unlikely to get a favorable response from NIH. There was nothing improper about Dr. Stukel taking the likelihood of long-term research funding into consideration when making a promotion decision.

Complainant points out that non-nucleoside research has proven more useful than his detractors predicted, but that point is irrelevant to this discussion. Application of hindsight to the nucleoside/non-nucleoside argument adds nothing to Complainant's position in this litigation. The only relevant time frame is the time frame of the promotion decision.

Finally, there is the evidence regarding Respondent's refusal to promote Dr. Hsi-Yuan Yang and Dr. Shome Sinha. Complainant argues that, because Dr. Yang and Dr. Sinha are Asian that their promotion denials are proof of an anti-Asian bias in Respondent's decisions. Complainant overstates the value of that evidence.

First, the instant case is not a pattern and practice case. The key issue is Complainant's treatment, not the treatment of Asians in general. Second, as Respondent notes in its briefs, the sample of Asian applicants simply is too small for it to provide useful statistical evidence in support of Complainant's position. Third, neither Dr. Yang nor Dr. Shome has the sort of unique characteristic noted above in the non-Asian comparatives Complainant has offered. Therefore, neither of those examples calls Respondent's justifications into question. In short, the decisions to deny promotions and tenure to Dr. Yang and Dr. Shome do not provide convincing proof of pretext.

In sum, although Complainant raised some interesting arguments, he failed to prove by a preponderance of the evidence that Respondent's articulated reason was a pretext for unlawful discrimination against him. He proved that he was a competent and well-trained member of Respondent's faculty, but that is not the standard for a promotion which includes an award of tenure. The Seventh Circuit has noted that "tenure decisions are often based on 'the distinction between competent and superior

achievement.'" ***Vanasco v. National-Louis Univ.***, 137 F.3d 962, at 968 (7th Cir. 1998), *citing* ***Kuhn v. Ball St. Univ.***, 78 F.3d 330, at 331 (7th Cir. 1996). Complainant failed to prove by a preponderance of the evidence that his tenure decision was based upon anything other than that distinction. Accordingly, his claim must fail.

One more matter needs to be addressed. In its answer to the complaint in this matter, Respondent requested an award of the attorney's fees incurred in its defense. That request was not addressed in the posthearing briefs, and Respondent arguably has waived the issue. Assuming that the issue has not been waived, the request should be denied. Under section 8A-102(I)(5) of the Act, a recommended order "may include an award of reasonable attorneys fees in favor of the respondent if the hearing officer concludes that the complaint was frivolous, unreasonable or groundless or that the complainant continued to litigate after it became clearly so." The instant claim does not come anywhere close to meeting that standard. The claim was not frivolous. It merely was unsuccessful. No fee award is justified under these circumstances.

RECOMMENDATION

Based upon the foregoing, Complainant failed to prove by a preponderance of the evidence that Respondent took his race or national origin into account when it failed to promote him and award him tenure. Accordingly, it is recommended that the

complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: August 8, 2001